

AUG 26 1992

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

J. BARON GROSHON
BY: 

In Re:

THOMAS N. SPRAGUE, a/k/a Glenn
Acre Farms, and BETTY LOU SPRAGUE,
Debtors.

Case No. 91-20038
Chapter 12

JUDGEMENT ENTERED ON AUG 26 1992

**ORDER APPROVING APPLICATION
FOR ATTORNEYS' FEES**

This matter is before the court on the objections by the debtors and by the United States of America to the application for attorneys' fees filed by Mountain Farm Credit. The debtors withdrew their objection at the start of the hearing. The court has concluded that the United States' objection should be overruled and that the requested attorneys' fees should be allowed and added to Mountain Farm Credit's secured claim.

FINDINGS OF FACT

1. On March 19, 1991, debtors Thomas N. Sprague and Betty Lou Sprague, filed a Chapter 12 voluntary petition in bankruptcy.

2. Mountain Farm Credit, a successor to The Federal Land Bank of Columbia, filed a proof of claim for \$150,979.52, evidenced by a note and secured by a deed of trust on approximately 53.4 acres of real property consisting of the debtors' farm and residence.

3. The United States of America, through its agency the Farmer's Home Administration, filed a Proof of Claim for an amount in excess of \$262,000.00 secured by the same track of real

property and by certain other assets of the debtors not subject to any lien in favor of Mountain Farm Credit.

4. Mountain Farm Credit brought an adversary proceeding in this bankruptcy case, Mountain Farm Credit, ACA v. United States of America (In re Sprague), Adv. Pro. 91-2188, to determine the priority of its lien relative to that of the United States. The United States filed an answer contesting Mountain Farm Credit's claim of a first lien position, but the parties subsequently settled the adversary proceeding with a consent judgment filed September 24, 1991 which provides, in pertinent part, that with regard to the 53 acre tract and residence the lien of Mountain Farm Credit is senior to the lien of the United States and that the extent of their senior lien "is declared to be the original principle amount, \$110,000.00, plus accrued interest and other charges which may be allowed by the United States Bankruptcy Court under the note and deed of trust attached to the complaint."

5. While the adversary proceeding was pending and following entry of the consent judgment, the debtors filed a number of proposed plans of reorganization, to which both the United States and Mountain Farm Credit objected. The debtors ultimately proposed a liquidation whereby the Chapter 12 Trustee would sell essentially all of the real estate assets and apply the proceeds to the debts. A confirmation Order was entered June 3, 1992.

6. Mountain Farm Credit seeks an award of attorneys' fees for services in two categories: 1) representation in the adver-

sary proceeding to determine lien priority; and 2) representation in the numerous other matters which culminated in confirmation of the Chapter 12 Plan.

7. The United States concedes that all of the services performed by counsel for Mountain Farm Credit were reasonably necessary to protect the interests of that creditor in these matters. It further concedes that the amounts charged for the work performed by those attorneys is reasonable and that the fees are reasonable under the circumstances of this case.

8. There is a provision in the promissory note addressing attorneys' fees as follows:

The undersigned ... agree, if this note is collected by an attorney through suit or otherwise after default, to pay all costs of collection and such reasonable attorney's fees as may be permitted by law.

9. The deed of trust incorporates this language in the following clause:

This conveyance is to be construed as a deed of trust, and is made to secure the performance of the covenants herein contained and is given wholly or partly to secure the payment of present obligations and future advances and future obligations which may, from time to time, be made and incurred hereunder; the present obligation is a loan ... evidenced by note of First Party to Third Party ... which note is made a part of this deed of trust to the same extent as if it were set forth in extenso herein.

This deed of trust also secures all future advances made by Third Party and all types and forms of future obligations incurred by First Party hereunder.

. . .

This deed of trust also secures all other advances made to and obligations accepted from First Party, under the terms of said note and any subsequent note or evidence of indebtedness secured hereby.

(Emphasis added).

10. Mountain Farm Credit's application is for attorneys' fees totaling \$9,510.00 and expenses totaling \$220.19. The application does not differentiate between fees incurred in the adversary proceeding and fees incurred in the other proceedings in the bankruptcy case.

11. The property securing the Mountain Farm Credit debt is worth substantially more than the principal amount of that debt, accrued interest, and the attorneys' fees and expenses requested by that creditor. The total value of the property securing the debt owed to the United States is apparently less than the total principal and interest owed on both the debts. The result is that if the court allows the application for attorneys' fees to Mountain Farm Credit, those fees will be paid from funds which otherwise would be applied to the debt owed to the United States.

CONCLUSIONS OF LAW

Attorneys' fees may be added to a secured claim under § 506(b) when four requirements are met: 1) the claim is an allowed secured claim; 2) the value of the security is greater than the claim; 3) the fees are reasonable; and 3) the agreement(s) under which the claim arose provides for the fees. 11 U.S.C. § 506(b). All of the requirements are met in the instant case and thus, Mountain Farm Credit's application for fees should be

allowed and may be added to the secured claim against the debtors.

Initially, the court finds that Mountain Farm Credit has an allowed secured claim, that the value of the property securing the promissory note is greater than the amount of Mountain Farm Credit's claim against the debtors, and that the fees requested in the application are reasonable. The remaining determinative issue is whether the agreements under which Mountain Farm Credit's claim arose provide for the requested attorneys' fees.

The promissory note is secured only to the extent provided in the deed of trust; thus, the attorneys' fees must be addressed in both the note and the deed of trust to qualify for secured status. The deed of trust expressly incorporates the terms of the promissory note. Accordingly, the attorneys' fees provision in the note is controlling. The note provides that if the note "is collected by an attorney through suit or otherwise after default" the borrower agrees "to pay all costs of collection and such reasonable attorney's fees as may be permitted by law." The language seems to imply that the note must actually be collected for the attorneys' fees to be paid. However, the court does not construe the language so strictly. Actions taken in an effort to collect the debt, whether collected in full or not, fall within a reasonable interpretation of the provision.

Courts have denied requests for attorneys' fees under § 506(b) in instances where the documents limit such recovery to expenses of foreclosure. Jackson v. Boulevard Mortgage Co. (In

re Nickleberry), 76 Bankr. 413, 425 (Bankr. E.D. Pa. 1987) ("foreclosure proceeding" should not "be read to include any bankruptcy court process, including motions to obtain relief from the automatic stay or the filing of Proofs of Claim"); In re Kudlacek, 109 Bankr. 424, 428 (Bankr. D. Nev. 1989). Even broader language has been rejected as a basis for awarding attorneys' fees incurred in a bankruptcy proceeding. In In re Tashjian, 72 Bankr. 968, 976 (Bankr. E.D. Pa. 1987) the court held that attorneys' fees incurred upon the filing of a motion for relief from stay did not fall within the provision in the security document providing that the defaulting party was liable to pay "all expenses ... including reasonable attorneys' fees, incurred in the collection of the delinquent Assessment by legal proceedings or otherwise."

Other courts adopt a more liberal approach in assessing the language of the security documents. Collection language in a security document was addressed in In re Alberto, 129 Bankr. 166, 168 (Bankr. N.D. Ill. 1991). Attorneys' fees incurred during extensive litigation involving whether certain property was property of the estate and the extent of creditors' claims to that property were allowed under language in a guaranty providing that the debtor would be liable for "expenses (including attorneys' fees and legal expenses) paid or incurred by the Bank in endeavoring to collect the Liabilities [pursuant to a note and deed of trust]." Id. In Meritor Mortgage Corp., West v. Salazar (In re Salazar), 82 Bankr. 538 (9th Cir. BAP 1987) the court ap-

proved the attorneys' fees incurred in a motion for relief from stay where the deed of trust provided for the payment of attorneys' fees in the event legal action was instituted on the note.

In the present case the debtors were in default prior to filing their bankruptcy petition. The filing of the bankruptcy petition limited Mountain Farm Credit's collection efforts to participation in the bankruptcy proceeding and the attorneys' fees incurred in this effort were contemplated under the note. The requested fees cover a wide spectrum of activities in this bankruptcy proceeding such as the filing of a complaint, submission of the proof of claim, responses to motions, review of the Plan, objections to confirmation, and appearances in court. All of the fees were incurred to enforce Mountain Farm Credit's collection rights under the agreements and, thus, fall within the attorneys' fees provision in the note.

The United States cited an Order in In re Owen, (89-10249, W.D.N.C. Oct. 24, 1991, Hodges, J.) to support its position that costs of collection do not include attorneys' fees associated with the administration of a bankruptcy proceeding. In the present case the court determines that the costs of collection include the attorneys' fees that are the subject of this Order. The Order in Owen was premised on different facts than those in the instant case, but to the extent that the Owen Order is inconsistent with the holding in this case, the Owen Order is superseded.

The court declines to address whether each item in the application represents an action to collect the indebtedness, rather that is a question left to the reasonableness prong of § 506(b). The documents contemplate the award of attorneys' fees incurred for collection of the note; the requested fees were incurred in Mountain Farm Credit's attempt to enforce its collection rights in this bankruptcy proceeding. The attorneys' fees may be added to the existing debt owing to the Mountain Farm Credit and such fees will be accorded secured status.

The court notes that the particular facts of a case or the specific language of the agreements may influence the court's decision to grant or deny secured status for attorneys' fees. A simple addition to the attorneys' fees provisions that references fees incurred in a bankruptcy proceeding would eliminate much of the confusion associated with this issue.

It is therefore ORDERED that Mountain Farm Credit's application for attorneys' fees is approved and that \$9,730.19 is added to the secured claim of Mountain Farm Credit.

This the 26th day of August, 1992.



George W. Hodges
United States Bankruptcy Court